

***Case No COMP/JV.56 -  
HUTCHISON / ECT***

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**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(2) NON-OPPOSITION  
Date: 29/11/2001

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29-11-2001  
SG (2001) D/292441

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PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(2) DECISION

**To the notifying party:**

**Subject: Case No COMP/JV.56 – Hutchison/ECT.**

Notification of 15.10.2001 pursuant to Article 4 of Council Regulation No 4064/89<sup>1</sup>

1. On 15 October 2001, the Commission received a notification pursuant to Article 4 of Regulation (EEC) No 4064/89 ("the Merger Regulation") of a proposed concentration by which the Hutchison Whampoa Limited Group – through its subsidiaries Hutchison Ports Netherlands S.a.R.L. and Hutchison Ports Netherlands BV – will acquire sole control of ECT Beheer BV. The latter company holds all of the share capital of Europe Combined Terminals BV (ECT).
2. The present operation was preceded by another operation involving the acquisition of joint control of ECT by Hutchison Port Holdings Ltd and Rotterdam Municipal Port Management. On 3 July 2001, the Commission granted clearance, subject to compliance with conditions imposed pursuant to Article 8(2) of the Merger Regulation.<sup>2</sup> It should be noted that the period within which some of those conditions

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<sup>1</sup> OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

<sup>2</sup> Commission Decision of 3 July 2001 in Case COMP/JV.55 – *Hutchison/RCPM/ECT*.

must have been fulfilled will elapse after the legal deadline for an investigation of the present operation under the Merger Regulation.<sup>3</sup>

3. After examination of the notification, and subject to full compliance with the attached commitments, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the EEA Agreement.

## I. THE PARTIES

4. The parties acquiring control are:

- Hutchison Ports Netherlands S.a.R.L., a wholly owned subsidiary of Hutchison Port Investments S.a.R.L., which in turn is wholly owned by Hutchison International Ltd. The latter is a member of the Hutchison Whampoa Group (Hong Kong) (Hutchison)<sup>4</sup>, a conglomerate with a diversified range of activities. Through various subsidiaries, Hutchison is active in the provision of stevedoring services in ports worldwide. In Europe, Hutchison, apart from its present joint control of ECT, controls, *inter alia*, the deep-sea container terminals of Felixstowe and Thamesport (UK).
- Hutchison Ports Netherlands BV, a holding company and subsidiary of Hutchison Atlantic Ltd, which is majority-owned by the Hutchison Whampoa Group.

5. The vendor is:

- Rotterdam Container Participatie Maatschappij BV (RCPM), a holding company that is wholly owned by Rotterdam Municipal Port Management (RMPM). The latter is a department of the Municipality of Rotterdam. RMPM is responsible for the development and management of the port of Rotterdam.

6. The target company, ECT, is a company engaged in the provision of stevedoring services at certain European ports, foremost Rotterdam. The share capital of ECT is held by a special-purpose holding company, ECT Beheer BV. The current shareholders of ECT Beheer BV are: Hutchison Netherlands BV (35%), RMPM (35%), ABN

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<sup>3</sup> The conditions obliged ECT to divest its shareholding in Maersk Delta BV (“MDBV”) to an independent buyer approved by the Commission within [...] from the date of the decision (with the possibility to extend the deadline under certain conditions) and to ensure – upon request - allocation of additional capacity to MDBV to allow it to handle third party business equivalent to **[a certain proportion]** of MDBV’s total capacity for each of the years 2001 to 2005. Furthermore, the parties should, from the date of the decision, terminate all contractual restrictions, which prevented MDBV from handling third party business or effectively competing with ECT on prices. It should in this context be noted that the parties have provided the Commission with documents showing that MDBV has been informed that it is released from all contractual restrictions that prevented it from handling third party business or competing with other providers of stevedoring services, including ECT. ECT has further confirmed to MDBV that it will not exercise its veto rights with respect to MDBV’s third party business, including veto rights over tariff, tariff structure and pricing. ECT’s shares in MDBV have however not yet been divested.

<sup>4</sup> Due to the fact that Hutchison Whampoa is present on the relevant market through various controlled subsidiaries, this Decision will refer to ‘Hutchison’ without specifying the relevant subsidiary, unless the context requires such specification.

AMRO Effecten Compagnie BV (ABN AMRO) (28%) and the employees' trust 'STAR' (2 percent).

7. The notifying parties are Hutchison Ports Netherlands S.a.R.L. and RCPM, notwithstanding that the latter is not an undertaking concerned by the concentration.<sup>5</sup>

## II. THE OPERATION

8. The subject of the notification is a share purchase agreement between Hutchison and RMPM/RCPM<sup>6</sup> whereby the former, through its subsidiary Hutchison Ports Netherlands S.a.R.L., will acquire (an additional) 25 percent of the shares in ECT Beheer BV from RMPM/RCPM. This will give Hutchison a total stake of 60 percent of the shares in ECT Beheer.<sup>7</sup>

## III. CONCENTRATION

9. In its decision in Case JV.55, the Commission concluded that Hutchison and RMPM had acquired joint control of ECT, which constituted a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.
10. The voting rules of ECT require a 60 percent majority for most commercially important decisions, save those affecting basic shareholders' rights (75% majority required). The transaction will give Hutchison the requisite 60 percent majority and will thus lead to it acquiring sole control of ECT. The change of control from joint to sole control constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.<sup>8</sup>

## IV. COMMUNITY DIMENSION

11. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (Hutchison EUR 7 919 million; ECT EUR 344 million).<sup>9</sup> Each of Hutchison and ECT has a Community-wide turnover in excess of EUR 250 million (Hutchison EUR [...] million; ECT EUR [...] million), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

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<sup>5</sup> See Commission Notice on the concept of undertakings concerned under Council Regulation no. 4064/89 on the control of concentration between undertakings, point 36.

<sup>6</sup> In the following 'RMPM' and 'RCPM' are used interchangeably, as RCPM is controlled by RMPM and has no business activity of its own.

<sup>7</sup> Through the 25% stake of Hutchison Ports Netherlands S.a.R.L. combined with the existing 35% stake of Hutchison Ports Netherlands BV.

<sup>8</sup> Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentration between undertakings, point 16.

<sup>9</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C 66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

## V. ASSESSMENT UNDER ARTICLE 2 OF THE MERGER REGULATION

### A Relevant Market

#### 1. Product markets

12. Hutchison and ECT are both container terminal operators providing stevedoring services to deep-sea container vessels in Northern Europe. There is no, or only very marginal, overlap between the parties to the concentration with regard to other business activities.
13. Deep-sea container terminal throughput<sup>10</sup> can be broken down by traffic flow as follows:
  - (a) hinterland traffic (also known as ‘direct deep-sea’), that is containers transported directly onto/from a deep-sea container vessel to/from the hinterland (via barge, truck or train), and
  - (b) transshipment traffic, that is containers destined for onward transportation to other ports. Transshipment traffic can in turn be sub-divided into relay traffic and feeder traffic. ‘Relay’ refers to containers moved between deep-sea vessel and deep-sea vessel (for example, containers transferred from a Far East liner shipping service to a transatlantic service). ‘Feeder’ concerns the movement to or from deep-sea vessels from or to short-sea vessels (feeder vessels).
14. In its decision of 3 July 2001 in *Hutchison/RCPM/ECT*, the Commission concluded that the provision of stevedoring services in respect of hinterland traffic and transshipment traffic each constituted a discrete relevant product market. It also concluded that there was insufficient evidence to justify a further breakdown of the transshipment market into discrete feeder and relay markets.
15. There have been no changes in the market in the five months that have elapsed since July 2001 that might cast doubt on the continuing validity of the above conclusion.<sup>11</sup>
16. The parties agree with the above product market definitions.

#### 2. Geographic dimension

##### Hinterland

17. In its decision in *Hutchison/RCPM/ECT* the Commission concluded that it was possible to distinguish a United Kingdom/Ireland market (on which Hutchison was present) and several North Continental markets (on which ECT was present). In view of the limited degree of overlap between the North Continent and the United Kingdom/Ireland hinterland markets, the Commission considered that the concentration

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<sup>10</sup> Terminal services provided to deep-sea container vessels can be distinguished from those provided to bulk carriers and short-sea vessels on the basis of differing user requirements.

<sup>11</sup> It should be noted that the notifying parties have agreed that the Commission may use all of the information (including market studies and statistics) submitted by the parties in Case JV.55 for the purposes of assessing the instant operation.

would neither create nor strengthen a dominant position on any hinterland market. There was therefore no need to further assess the impact of the concentration on these markets.

18. The available evidence indicates that the above conclusion is still valid. The market studies<sup>12</sup> cited in support of that conclusion are still the most recent reliable and comprehensive source of information on the services and markets in question. There is no evidence to suggest that either the hinterland markets or the parties' presence on those markets have undergone any significant change in the period since July 2001.
19. The parties agree with the Commission's conclusion that as there is little or no overlap between Hutchison and ECT on any conceivable hinterland market there is no need to assess further the impact of the concentration on these markets.

#### Transshipment

20. The available market studies and other evidence indicate that the potential substitutes for transshipment traffic in Northern Europe include all main deep-sea ports in the Gothenburg – Le Havre range;<sup>13</sup> that is to say, all ports having sufficient hinterland volumes to justify a direct call by a container liner shipping service.<sup>14</sup>
21. The parties have argued that the geographic market for the provision of stevedoring services to transshipment traffic should be extended to encompass ports in Southern Europe. The parties point in particular to growth in the volumes handled by these ports as evidence of increasing competition to Northern European ports for transshipment traffic.
22. In the Commission's view, with the possible exception of Algeciras, Southern European ports do not pose any serious threat to Northern European ports in respect of transshipment traffic. The growth in volumes is largely explained by the fact that a number of Mediterranean ports<sup>15</sup> now act as regional hubs from which cargoes are fed to those Southern European ports that generate insufficient volumes to justify a direct call by a deep-sea container service. There is little overlap between Northern and Southern European ports with respect to that traffic. As for Algeciras, [...] of the throughput of the main container terminal, which is controlled by the A.P. Møller Group, is accounted for by Maersk Sealand, an A.P. Møller subsidiary. These volumes represent captive production, which should not be included in the market when determining market shares. The inclusion of Algeciras in the relevant market would therefore have little or no impact on the structure of that market.

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<sup>12</sup> Ocean Shipping Consultants Ltd (OSC), *North European Containerisation* (2000), *Briefing Paper* (2001); Drewry Shipping Consultants Ltd (Drewry), *European Container Port Market Data* (2000).

<sup>13</sup> A view confirmed by market studies (for example, *Briefing Paper* and *North European Containerisation*), by the notifying parties and by third parties (customers and competitors).

<sup>14</sup> Felixstowe, Thamesport, Southampton, Le Havre, Zeebrugge, Antwerp, Rotterdam, Bremerhaven, Hamburg, Gothenburg.

<sup>15</sup> E.g. Marsaxlokk, Cagliari, Gioia Tauro.

### Conclusion on the relevant market

23. It is concluded that the relevant market to be considered in this case is the market for the provision in Northern Europe of stevedoring services for transshipment traffic carried by deep-sea container vessels.

## **B Competitive Assessment**

### *Introduction*

24. In its decision in Case JV.55, the Commission concluded that Hutchison and RCPM's joint control of ECT would lead to the creation of a dominant position on the relevant market. That transaction was cleared, subject to compliance with conditions imposed under Article 8(2) of the Merger Regulation. As pointed out in para. 2 above, the legal deadline for the investigation of the present operation will expire before the period within which all conditions therein imposed must have been fulfilled. For that reason, the competitive situation brought about by the combination of ECT and Hutchison must be assessed in the present operation on the basis of the current market situation.

### *Market structure*

#### Throughput

25. 1999 is still the most recent year for which complete transshipment throughput data are available. OSC estimates that Hutchison and ECT had a combined share of **[45- 50%]** of the Northern European transshipment market in that year. The closest competitors, HHLA and Eurogate, accounted for **[15-20%]** and **[15-20%]**, respectively.<sup>16</sup>
26. In the present notification, the parties have submitted a preliminary overview of year 2000 transshipment traffic, prepared by OSC for the purpose of this notification. According to this overview, the parties have a combined market share of **[over 40%]**. The preliminary overview is based partly on actual throughput and partly on estimates.
27. The apparent decline in the market share of the parties, according to the preliminary overview mentioned above, is attributable to a sharp drop in Maersk Sealand volumes handled by ECT. This drop (from **[around 1 000 000]** TEUs in 1999 to just **[over 500 000]** TEUs in 2000) is only partly explained by the switch of **[approximately 300 000]** Maersk Sealand TEUs from Rotterdam to Bremerhaven in June 2000. Further, OSC's figure for total transshipment throughput in Northern Europe in the year 2000, 6.1 million TEUs, clearly includes volumes<sup>17</sup> that represent captive production and that should therefore be excluded from the basis for the calculation of market shares. The exclusion of these volumes, attributable to competitors, would lead to a quite substantial increase in the parties' market share. The figures provided in the preliminary overview submitted by the parties could therefore be questioned.

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<sup>16</sup> OSC *Briefing paper*, page 13.

<sup>17</sup> E.g. Maersk Sealand volumes handled by the North Sea Terminal in Bremerhaven (a joint venture between A.P. Møller (50%) and Eurogate (50%).

28. However, even if the OSC figures for the year 2000 were to be taken at face value, the Commission's investigation has shown that Hutchison/ECT would still have a market share that is greater (at **[40-50%]** ) than the combined market share (**[30-40%]**) of the three closest competitors, Eurogate, Hamburger Hafen- und Lagergesellschaft (HHLA) and Hesenatie.
29. Further, the OSC figures confirm the Commission's finding in *Hutchison/RCPM/ECT* that transshipment traffic is concentrated in just five Northern European ports.<sup>18</sup> Hutchison/ECT controls two of those ports, Felixstowe and Rotterdam.

### Capacity

30. There is little correlation between shares of overall Northern European deep sea container port capacity and shares of actual transshipment throughput in ports in Northern Europe.<sup>19</sup> The statistics available to the Commission can therefore only provide a very imperfect indication of the parties' position. In 1997, Hutchison/ECT thus had a combined share of actual transshipment throughput of approximately **[below 50%]** , but a combined share of overall capacity of **[30-35%]** . In 1999, the parties' combined transshipment share was approximately **[below 50%]**, while their capacity share was only **[around 30%]** .
31. The available evidence<sup>20</sup> indicates that the parties' share of overall Northern European deep sea container port capacity in the year 2000 is approximately **[30-35%]**.<sup>21</sup> A prospective analysis suggests that the parties' share of overall capacity may be expected to decline somewhat to **[25-30%]** by the year 2005. However, a great deal of uncertainty attaches to any prediction of future capacity shares, as there are a number of variables that may affect the expansion projects that are currently planned.<sup>22</sup> Evidence shows that most of the expansion plans and projects face considerable problems in sticking to planned timetables.<sup>23</sup>

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<sup>18</sup> Rotterdam, Hamburg, Felixstowe, Bremerhaven and Antwerp account for 90% of all Northern European transshipment traffic.

<sup>19</sup> Port statistics do not distinguish between 'transshipment capacity' and 'hinterland capacity'.

<sup>20</sup> Market studies and other port data cited in the *Hutchison/RCPM/ECT* decision at paras. 64-67, such as notably the Ocean Shipping Consultants Ltd (OSC) report *North European Containerisation, 2000*. This is the most recent comprehensive data that is available.

<sup>21</sup> The parties submit that the Hutchison/ECT year 2000 capacity share is approximately **[25-35%]\*** (page 36 of the Notification).

<sup>22</sup> E.g. regulatory hurdles, financing, global patterns of supply and demand.

<sup>23</sup> Third party replies indicate that for example in the Port of Antwerp "legal problems with the dock construction" regarding the Deurganckdock mean that completion dates are only provisional. The same is true of Vlissingen, which is still in the project phase.



## *Specific competitive advantages*

### Share of port calls

32. Hutchison/ECT (Felixstowe, Thamesport, ECT Rotterdam) accounted for approximately [**just below 40%**] of total scheduled weekly calls by the major carriers on the Northern Europe – Far East trade in 2000.<sup>24</sup> Hamburg accounted for [**17-20%**], Le Havre for [**10-15%**] and Antwerp for [**7-10%**].<sup>25</sup>
33. The parties' share in the same year (2000) of total scheduled weekly calls in Northern Europe by the major Transatlantic services was [**slightly over 30%**]. Bremerhaven and Le Havre accounted for [**15-20%**] each, and Antwerp for [**10-15%**].
34. The above trades together account for almost three quarters of total Northern European deep-sea container throughput and employ the largest vessels. The largest vessels generate an increasingly higher proportion of transshipment volumes<sup>26</sup> A high share (relative to other ports) of port calls by services on these trades is therefore evidence of a strong position on the transshipment market.

### Natural advantages

35. In recent years, there has been a clear trend towards the ordering and deployment of very large container vessels (6000+ TEUs).<sup>27</sup> These vessels are intended for use primarily on the Europe – Far East trades. The deployment of these vessels and of vessels of the next generation (9000 – 10 000 TEUs) will put new and heavy demands on Northern European ports.<sup>28</sup> In particular, these very large vessels require deeper access channels and berths and adequate land-side infrastructure (rail and land capacity).
36. In this respect, the Hutchison/ECT terminals enjoy a clear advantage over river ports such as Hamburg and Antwerp, by virtue of direct deep-sea access (this is particularly true for the ECT Delta terminal in Rotterdam) and deep berths. Of the five front rank Northern European ports,<sup>29</sup> only Bremerhaven has deep-sea access comparable to Rotterdam and Felixstowe.

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<sup>24</sup> *European Container Port Market Data*, page 6.

<sup>25</sup> OSC notes (*North European Containerisation*, page 196) that there has been a very sharp concentration of the Europe – Asia services' port calls at the front rank Northern European ports over the period 1995-1999. In 1995, Felixstowe, Rotterdam and Hamburg together accounted for some 34 percent of the Europe-Asia services' port calls. In 1999, these ports' share had increased to roughly 61 percent. OSC concludes that this trend of concentration at the best located and configured terminals is likely to continue, driven by the increase in the size of the Europe-Asia vessels.

<sup>26</sup> *North European Containerisation*, page 207.

<sup>27</sup> See sources and data cited in the *Hutchison/RCPM/ECT* decision at paras. 97-99 and footnotes 89-95, notably *North European Containerisation* and *The Competitive Position of Felixstowe versus Rotterdam Terminals*, OSC, September 1998.

<sup>28</sup> See, *inter alia*, American Shipper, August 2001: 'Big Ships. Big Problems'.

<sup>29</sup> Rotterdam, Felixstowe, Hamburg, Bremerhaven, Antwerp.

37. The Hutchison/ECT terminals, in particular ECT Rotterdam, also enjoy good hinterland access in the form of rail, road and (for Rotterdam) inland waterway connections.<sup>30</sup>

### *Specific competitive constraints*

#### Capacity developments

38. The parties have argued that capacity developments at other Northern European ports will lead to an erosion of Hutchison/ECT's share of transshipment throughput over the period up to 2005.<sup>31</sup> However, as has been pointed out above (see paragraph 31), capacity enhancement projects generally do not go ahead as planned and scheduled.
39. In this respect, the Commission notes again that there is little correlation between capacity shares and shares of actual transshipment throughput (see above para. 30). Moreover, as pointed out above, prediction of future capacity shares are subject to considerable uncertainty (see para. 31). The Commission also notes that, in any event, the capacity share of Hutchison/ECT will not decline significantly over the period up to 2005 (see above para. 31).

#### Carrier-owned facilities

40. The parties claim that the emergence of container terminals owned and controlled by shipping lines will restrict the ability of Hutchison/ECT to exercise market power and in particular to raise prices.
41. In this respect the Commission notes, first, that less than a handful of carrier-owned facilities are currently in operation.<sup>32</sup> Secondly, the facilities that are in operation are owned (solely or jointly) by the largest shipping lines. There is no indication that smaller shipping lines have the desire or ability to acquire container terminals. Thirdly, the existing carrier-owned terminals consist for the most part of joint ventures with incumbent terminal operators. This is notably the case for the Maersk Delta BV (MDBV) joint venture, which was established by ECT and Maersk Benelux BV in order to provide a dedicated deep-sea container terminal in the port of Rotterdam for the Maersk Sealand shipping line. The terminal commenced operations in October 2000. ECT currently holds one third of the shares in MDBV. Contractual arrangements initially expressly precluded the joint venture from offering its services to third parties before 2007 or competing on prices with ECT.<sup>33</sup> The foregoing indicates that the

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<sup>30</sup> See, *inter alia*, *North European Containerisation*, pages 59-60.

<sup>31</sup> The end of the year 2005 has been chosen as the cut-off date for taking account of capacity expansion plans; the Commission considers that expansion plans with a completion date projected for after 2005 are subject to too many imponderables to be taken into account in this decision.

<sup>32</sup> Maersk/Eurogate North Sea Terminal (Bremerhaven); Maersk Delta BV joint venture (Rotterdam); Altenwerder (Hamburg).

<sup>33</sup> In order to comply with the conditions imposed under the Commission's decision in the *Hutchison/RCPM/ECT* case, the notifying parties of that operation have informed MDBV that it is released from any contractual obligation, which would prevent it from handling third party business.

possibility of independent entry by shipping lines on the relevant market is in practice limited.

#### Countervailing buying power

42. The parties contend that the demand side of the market is characterised by concentration such that it would constrain any market power that Hutchison/ECT might exercise.
43. In this respect, it should be noted that the liner shipping industry is still relatively fragmented.<sup>34</sup> Although carriers often enter into alliances to provide a joint maritime service or services on a particular trade or trades, these agreements cover only the operational aspects necessary to provide the maritime service. It should also be noted that alliance members compete with each other both on price and on door-to-door service and that their interests do not therefore always coincide. This applies in all areas, including with regard to the choice of terminal operator.<sup>35</sup>
44. Any demand-side concentration is in any event more than outweighed by the degree of supply-side concentration, particularly with regard to terminal services provided to carriers on the Europe-Asia trades (see above para. 32 and footnote 25).
45. The Commission investigation has also shown that the shipping lines' ability and incentives to switch throughput (completely or partially) to alternative ports are rather limited. This is mainly explained by the current lack of sufficient capacity to accommodate larger volumes at short notice and the significant reworking of schedules and timetables, loops and changes in terminal cut-offs, which a switch would require.

#### ***Conclusion***

46. The Commission concludes from the above analysis that the concentration will lead to the creation of a dominant position on the relevant market. In reaching this conclusion, particular importance has been attached to the following factors:
  - (1) the current high combined market share of Hutchison and ECT on the relevant market, in conjunction with the relatively low market share of the closest competitors;
  - (2) the concentration of transshipment traffic to only five ports in Northern Europe, two of which are controlled by the parties;
  - (3) the parties' high combined share of port calls by the major liner services on the Northern Europe – Far East and Transatlantic trades;

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<sup>34</sup> See Commission decision of 06.10.1999 in Case COMP/M.1651 – *Maersk/Sea-Land*.

<sup>35</sup> As an example, P&O Nedlloyd has chosen to establish a hub in Rotterdam; Hapag-Lloyd has instead invested in Hamburg. Both operators are members of the Grand Alliance. The parties themselves point out that there will be no obligation on Grand Alliance members calling at Rotterdam to use the joint ECT/P&O Nedlloyd Euromax facility in that port, even though P&O Nedlloyd may wish them to do so.

- (4) the natural advantages enjoyed by the parties' terminals, in the form of deep-water channels and berths and good hinterland connections.

## VI. COMMITMENTS SUBMITTED BY THE PARTIES

47. In order to resolve the competition concerns identified by the Commission, the parties have submitted commitments on 5 November 2001 in relation to ECT's involvement in the MDBV joint venture.<sup>36</sup>
48. All commitments are subject to normal provisions concerning their fulfilment, including the involvement of a trustee. The full text of the commitments is provided in Annex 1, which forms an integral part of this decision. The undertakings can be summarised as follows:
- a) ECT will divest its minority shareholding in MDBV to an independent buyer approved by the Commission.
  - b) Hutchison and ECT will make available to MDBV capacity to allow MDBV to handle third party business equivalent to **[a certain proportion]** of MDBV's estimated total capacity for each of the years 2001 to 2005.
49. These commitments are in substance identical to those which were accepted in Case COMP/JV.55.<sup>37</sup> In the light of the fact that these commitments have not yet been implemented, they are re-submitted in order to solve the competition concerns which still exist on the market as a result of Hutchison's and ECT's combined market power.
50. RMPM, even though it is not an undertaking concerned by the concentration (see para. 7 above), has stated that land at the Maasvlakte II development will be allocated in accordance with open, transparent and non-discriminatory procedures. Moreover, in order to facilitate the fulfilment of condition (b) above, RMPM has given its assurance to Hutchison and ECT that it will take the necessary action.<sup>38</sup>

## VII ASSESSMENT OF THE COMMITMENTS

51. Once implemented, the commitments will enable MDBV to offer fully independent competitive services in the same area of the Port of Rotterdam in which ECT is active through its Delta terminal (deep-sea terminal). Due to the importance of the Port of Rotterdam on the relevant market (as described above), introduction of effective competition in that very port can be expected to have a constraining effect on Hutchison/ECT's combined market power.
52. In order for MDBV to emerge as a serious competitor to ECT, it is necessary that ECT should divest its current substantial interests in MDBV. The obligation to make available capacity will furthermore guarantee that MDBV can develop and expand its

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<sup>36</sup> See above paragraph 41.

<sup>37</sup> See footnote 3 above.

<sup>38</sup> See letter from RMPM attached as Annex A to the commitments in Annex 1.

third party business and is necessary in order to ensure that MDBV can become a sufficiently strong competitor in a short period of time.

53. The above aspect of the commitments (points (a) and (b)) constitute conditions, as only by fulfilling these can the desired structural changes on the relevant market be achieved. The provisions relating to the trustee, as set out in paragraphs 8-13 of Annex 1, constitute obligations, as they concern the implementing steps necessary to achieve the structural change that is sought.
54. The implementation of the proposed commitments will ensure the possibility of significant competition in one of the main transshipment hubs in Northern Europe. Taken as a whole, the commitments will therefore prevent the emergence of a dominant position on the relevant market.
55. In this context, the Commission also takes note of RMPM's statement concerning the allocation of land at the Maasvlakte II development, which will consequently give MDBV an equal opportunity to expand its capacity in the period after 2005. The Commission further notes that RMPM, as the undertaking responsible for the development and management of the Port of Rotterdam, has given its assurance that it will facilitate the parties' fulfilment of condition (b) above.

## **VI. CONCLUSION**

56. For the above reasons, and subject to full compliance with the submitted commitments, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Articles 6(1)(b) and 6(2) of Council Regulation (EEC) No 4064/89.

For the Commission

*signed*  
Mario MONTI  
Member of the Commission

## Undertakings in Case No COMP/JV.56 – Hutchison/ECT

### I Introduction

1. On 15 October, 2001, pursuant to Article 4 of Council Regulation (EEC) No 4064/89 (the “Merger Regulation”) Hutchison Ports Netherlands S.a.R.L. and Rotterdam Container Participatie Maatschappij BV (“RCPM”) have notified a concentration pursuant to which Hutchison Whampoa Limited Group, through Hutchison Ports Netherlands S.a.R.L. and Hutchison Ports Netherlands BV, will acquire sole control of ECT Beheer BV. The latter holds 100 percent of the share capital in Europe Combined Terminals BV (“ECT”).
2. In connection herewith, the notifying parties and Rotterdam Municipal Port Management (“RMPM”) (collectively referred to as “the Parties”) make the following commitments pursuant to Article 6(2) of the Merger Regulation. The commitments are subject to the Commission finding that the notified transaction is compatible with the common market pursuant to Article 6(2) of the Merger Regulation (the “Decision”).

### II Divestiture of ECT’s shareholding in MDBV

3. The Parties undertake that ECT will divest its shareholding in Maersk Delta BV (“MDBV”) to an independent buyer approved by the Commission on or before [...]. This period may be extended by an additional period of maximum 4 months at the Parties’ reasoned request, provided that the trustee appointed pursuant to section IV below can satisfactorily establish that ECT has, despite its best efforts, been unable to carry out such divestiture within the initial period. When considering such extension of the deadline for the divestiture of the shares, the Commission shall take into account the procedural process set out in Article 4 of the joint venture agreement between ECT and Maersk Benelux BV (the Joint Venture Agreement).

### III Relations with MDBV

#### Changes to contractual restrictions

4. In Case No COMP/JV.55 (Hutchison/RCPM/ECT), Hutchison Ports Netherlands BV, RCPM and RMPM have accepted the following undertaking:

(a) In order to permit MDBV to handle third party business, MDBV will immediately and unconditionally be released from any contractual restriction, which currently prevents it from handling third party business and MDBV will be informed thereof;

(b) ECT will renounce the exercise of ECT’s veto rights in MDBV and confirm MDBV’s freedom to determine tariff, tariff structure and pricing;

(c) ECT will confirm MDBV’s freedom to compete with other providers of stevedoring services, including ECT.

5. The above mentioned undertaking has been fully implemented immediately after the Commission’s Decision of 3 July 2001 in Case No COMP/JV.55. On 12 July 2001 the Commission was informed about the implementation measures.

#### Assurance of available capacity for MDBV

6. Hutchison Ports Netherlands BV, Hutchison Ports Netherlands S.a.R.L. and ECT (hereafter: "Hutchison") will enable MDBV to develop such capacity as to allow it to handle third party business equivalent to **[a certain proportion]** of MDBV's total capacity for each of the years 2001 to 2005. Hutchison, which for this purpose has received adequate assurance from RMPM (Annex A **[letter from RMPM to Hutchison, assuring available capacity for MDBV]**), undertakes to make available to MDBV at normal business conditions the land, facilities, barge loading areas and quay walls necessary to achieve this objective. The said land, facilities, barge loading areas and quay walls will not necessarily be the land facilities etc. actually operated by ECT. For the purpose of calculating MDBV's need for capacity, **[a document]** will be the relevant starting base. Also and in order to ensure that no undue advantage is taken from Hutchison's commitment, calculations will disregard upward capacity not stemming from natural growth, such as acquisitions or excessive traffic flows originally handled in other ports and switched by **[a shipping line]** to **[a terminal]**.

7. RMPM confirms that land and necessary facilities at the planned Maasvlakte II area will be allocated according to an open, transparent and non-discriminatory procedure.

#### **IV Trustee**<sup>1</sup>

##### Appointment of a trustee

8. No later than one week after the Commission has adopted the Decision, the Parties shall propose to the Commission a trustee suitable to monitor and implement the commitments referred to above. The trustee must be independent from the Parties. The appointment of the proposed trustee is subject to approval of the Commission.

9. Should the Commission reject the proposed trustee, the Parties will propose the name of a new trustee within one week after being informed of the rejection. If the new trustee is rejected by the Commission, the Commission shall nominate a suitable trustee whom the Parties will appoint or cause to be appointed.

##### Mandate of the trustee

10. Within one week of the date on which the Commission has approved a trustee, the Parties shall enter into a mandate agreement with the trustee. The mandate agreement shall confer on the trustee all the rights and powers necessary to exercise its tasks and describe the obligations and the remuneration. The terms of the mandate agreement will have to be approved by the Commission.

11. The trustee shall monitor and advise the Commission on the implementation of this commitment and ensure its compliance by the Parties. The trustee will provide, in due time before [...] and after this date on a regular six months basis, written reports to the Commission on the progress of the discharge of its duties of its mandate, identifying any respect in which it has been unable to discharge its mandate. The parties shall receive a non-confidential copy of such reports. In addition to these reports, the trustee shall promptly report in writing to the Commission if the trustee

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<sup>1</sup> The following provisions are drawn up in accordance with the Commission Notice on remedies acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98, notably paragraphs 53-57 thereof.

concludes on reasonable grounds that the Parties are failing to comply with any of the conditions or obligations under these commitments. The Parties shall receive a simultaneous non-confidential copy of any such additional reports. A non-confidential copy of all herein mentioned reports shall also be sent to MDBV and Maersk Benelux. The Parties shall be given the opportunity to comment in advance on the confidential nature of all documents to be submitted to MDBV and Maersk Benelux.

12. If the Parties have not entered into a binding contract with a purchaser approved by the Commission within the time period specified above (including the maximum additional time period), or have not completed the sale within a further period of one month, the trustee shall have the power to carry out the divestiture within a further time period of two months. The trustee shall carry out the divestiture on the best possible terms and conditions in accordance with good business practice. He is not bound by any minimum price.

13. The Parties shall provide the trustee with all such assistance and information as the trustee may reasonably require.

14. The trustee is bound to respect the confidentiality of all information provided to him or otherwise obtained by him in the course of the exercise of his mandate. Notwithstanding the trustee's overall responsibility to carry out his task as an independent unrelated third party, the trustee shall have, to the extent possible given the nature of his task, due regard to the commercial interest of the Parties and undertake in the mandate to do so.



**ANNEX A**

**[Letter from RMPM to Hutchison, as referred to in paragraph 6 of the document  
"Undertakings in Case No COMP/JV.56 - Hutchison/ECT"]**